(2)

NO. 05-1536

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

CLAYTON FRANK, Warden, Halawa Correctional Facility;
and the STATE OF HAWAII,

Petitioners,

- vs -

WAYMAN KAUA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under Hawaii's extended-term sentencing scheme, a judge increased respondent's maximum indeterminate terms of imprisonment from the ordinary terms authorized by the jury's verdicts. To do so, state law required the judge to find that extended-term sentences were necessary for the protection of the public. State law also required that the judge expressly find further facts -- which the state courts characterize as "extrinsic" to the "intrinsic" offense elements found by the jury -- to justify this public-protection finding. In respondent's case, the judge found that respondent had a substantial history of drug abuse and assaultive and threatening behavior, he was unable to control himself when stressed and on drugs, he had ready access to guns, he had been on parole when he committed his offenses, he used drugs shortly before committing his offenses, children were endangered by his offenses, and at least one victim was severely traumatized, although she did not seem to realize it and was not physically injured. The jury's verdicts did not encompass these facts. Yet these facts were essential to authorizing respondent's extended-term sentences.

1. Did the Ninth Circuit correctly hold that the Hawaii Supreme Court's decision, upholding the constitutionality of respondent's extended-term sentences because the findings at issue were "extrinsic" to the offense elements found by the jury, was contrary to Apprendi v. New Jersey, 530 U.S. 466 (2000)?

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STATEMENT OF THE CASE

1. The petitioners' statement of the case fails to recite what offenses the State actually had accused respondent of committing, emphasizing instead that the jury convicted respondent of "nine felony offenses." Petition for Writ of Certiorari ("Pet.") at 3. The omission is telling. Unlike the included offenses that the jury ended up convicting respondent of committing on many counts, some of the charged offenses that the jury *rejected* carried the very sentences -- including a life sentence -- that the State succeeded in having a judge, after finding facts the jury did not, impose upon respondent *despite* the verdicts' failure to authorize such sentences.

The State originally charged respondent with thirteen offenses. See Respondent's Appendix ("Res. App.") at a1-a7. In Counts 1 through 4, the State accused respondent of committing attempted first-degree murder, a crime punishable by life imprisonment without the possibility of parole. See Haw. Rev. Stat. §§ 705-500, 706-656, and 707-701. The jury refused to convict respondent of first-degree murder under any of these counts. Indeed, the jury *acquitted* respondent outright on Count 1. And the jury did not convict him of even second-degree murder, which is punishable by life imprisonment with the possibility of parole, see Haw. Rev. Stat. §§ 706-656 and 707-701.5, under Counts 2 through 4, since the State did not insist upon submitting it as an included offense. Instead, the jury convicted respondent of other included offenses; specifically, attempted first-degree assault,

first-degree reckless endangering, and attempted manslaughter. As such, the jury's verdicts only authorized imposition of ten years' imprisonment on Count 2, five years' imprisonment on Count 3, and twenty years' imprisonment on Count 4. See Haw. Rev. Stat. §§ 705-500, 706-659, 706-660, 707-702, 707-710, and 707-713.

In Counts 5 through 7, the State accused respondent of kidnapping. See Haw. Rev. Stat. § 707-720. Although the jury convicted as charged on two of these counts, it expressly found that respondent had voluntarily released the victim in a safe place without serious or substantial bodily injury. The jury's finding of this circumstance reduced the offenses from class-A felonies punishable by twenty years' imprisonment to class-B felonies punishable by only ten years' imprisonment. See Haw. Rev. Stat. §§ 706-659, 706-660, and 707-720(3); State v. Kaua, 72 P.3d 473, 474 (Haw. 2003) ("Kaua I") (Petitioners' Appendix ("App.") at 39). On the third kidnapping charge, the jury convicted of only a lesser included offense -- second-degree unlawful imprisonment, a crime carrying only a five-year imprisonment sentence. See Haw. Rev. Stat. §§ 706-660 and 707-722.

As a factual matter, the jury found that these three convictions "merged" with the jury's conviction of using a firearm in the commission of a separate felony under Count 13. See Haw. Rev. Stat. § 701-109; see also, e.g., State v. Birano, 126 P.3d 357, 359 n. 2 (Haw. 2006); State v. Hoey, 881 P.2d 504, 525-526 (Haw. 1994). Accordingly, the state court dismissed Counts 5, 6, and 7 at sentencing pursuant to

state law. See Kaua I, 72 P.3d at 475 (App. at 39); Hoey, 881 P.2d at 525-526. In sum, then, the jury's verdicts on Counts 5, 6, 7, and 13 authorized only a single twenty-year term of imprisonment. See Haw. Rev. Stat. §§ 134-6 and 706-659; see also Hoey, 881 P.2d at 525-526.

On the remaining five counts, the jury convicted respondent, as charged, of four offenses carrying five-year sentences and one offense carrying a ten-year sentence. See Haw. Rev. Stat. §§ 134-7(b), 706-660, 707-716, and 707-713.

2. The petitioners' recitation of the facts also fails to state what the jury's verdicts reflect the jury factually found. The jury's verdict on Count 2 found that respondent attempted to cause serious bodily injury to one person. Its verdict on Count 3 found that he recklessly placed a second person in danger by discharging a firearm. And its verdict on Count 4 found that he attempted to cause the death of a third, but only while acting under an extreme mental or emotional disturbance. See Haw. Rev. Stat. §§ 705-500, 707-702, 707-710, and 707-713.

The jury's verdicts convicting respondent of kidnapping, unlawful imprisonment, and use-of-a-firearm-in-the-commission-of-a-separate-felony (Counts 5, 6, 7, and 13) found that respondent used a firearm to restrain a fourth person, but that he voluntarily released her unharmed in a safe place. These verdicts further found that he harbored a tripartite intent: (1) to terrorize her, (2) to use her as a shield or hostage, and (3) to interfere with the performance of a governmental function. See

Haw. Rev. Stat. §§ 134-6(a), 707-720(1)(b), 707-720(1)(f), and 707-722(1). And the jury's verdicts on the remaining counts found that respondent used a firearm to threaten the person he kidnapped, that he possessed a firearm while being a felon, and, by discharging the firearm, recklessly placed three other people in danger. See Haw. Rev. Stat. §§ 134-7(b), 707-713, 707-716(1)(d).

None of the people that the jury found to be victims of respondent's crimes were children. Nor did the jury find that any victim had been psychologically traumatized. Nor did the jury make any findings regarding respondent's use of drugs, his parole status, or his past behavior.

3. Petitioners further fail to recite precisely what a state judge found in sentencing respondent to extended-term sentences pursuant to Hawaii's extended-term sentencing scheme. See Haw. Rev. Stat. §§ 706-661, 706-662, and 706-664. Doing so, however, demonstrates that respondent's maximum sentences were increased on the basis of factual findings that went beyond those found by the jury and that did not consist of simply the fact that respondent had prior convictions.

In orally granting the State's motion for imposition of extended terms of imprisonment, the judge emphasized that he was finding that such terms were necessary for the protection of the public primarily for five reasons. One, respondent abused drugs. Two, when using drugs and under stress, respondent was belligerent and unable to control himself. Three, respondent appeared to obtain firearms easily.

Four, the physically unharmed kidnapping victim was nonetheless "severely traumatized." And, five, "there were children in the vicinity" during the stand off between respondent and the police. The judge orally ruled as follows:

> Defendant's history suggests the following; from an early age, alcoholism, substance abuse. And the substance abuse is of great concern, because as a youth, it went from marijuana to cocaine, opiates, and then crystal methamphetamine. The use sometimes was sporadic. But when the defendant abused the drugs, it was very severe. And undoubtedly, in the days or weeks surrounding these offenses and perhaps shortly before these offenses, the defendant was abusing drugs in the court's judgment.
>
> Now, his history also suggests assaultive behavior, threatening behavior. We have abuse of household member, terroristic threatening, other incidents which have been reported or mentioned by the prosecution. Basically, it's the court's conclusion that while under the influence or while under extreme stress, the defendant is unable to control his behavior. And that impairment has brought about assaultive behavior as well as threatening behavior.
>
> Of more concern is that in the defendant's history, his access to firearms. Before these incidents, the defendant did have a firearm conviction. And reportedly on other occasions, he resorted to use of firearms, although in one incident, I understand that it's been disputed. And, of course, in the incidents before the court, the defendant used an assault rifle.
>
> ....
>
> One thing I want to mention is that in presiding over the trial, it's my judgment that Vicky Bart was severely traumatized, and she's still undergoing that trauma. She may not realize it. But in my experience, I've seen people

who have gone through that. And it's also my judgment that during this incident, she, in some respect, identified with her captor. So there was injury. And I think -- and she may not have been -- I don't know whether or not she's receiving that treatment. For her, I think that she should go and receive that counseling so that she can put her life together. But in any event, I think that -- it's my belief, and it's a firm one, that she was severely traumatized from that incident.

....

And I don't agree with the defense that it was only the defendant who was hurt in this incident. He used a rifle at long range, and I do not believe that the defendant was experienced with use of that assault rifle. Shooting at long range with people in the vicinity, without any kind of experience -- and certainly he didn't show any kind of experience; otherwise, he would have hit that police officer who was hiding behind his vehicle -- other people could have been hurt by wild shots. And these were shots in the direction of a police officer, and I kind of think that defendant knew that it was a police officer who was there. Certainly he had the assistance of his spouse in identifying who these people were outside and [in] what capacity they were out there. It's not only the police officer who could have been shot, but it could have been other people. And I understand that there were children in the vicinity. He may not have intended to hit any children. But in the manner that the rifle was being fired, there's also a strong -- always a strong possibility that minors could have been hurt as well as other innocent bystanders.

Basically, the defendant, I believe when I look at the factors and consider his character, his history, his attitude, and the need for a structured environment, I believe that

> it's necessary for the protection of the public to impose the extended terms.

Res. App. at a26-a29.

In his written order memorializing the foregoing oral ruling, the judge, as state law requires, similarly justified imposing extended-term sentences by expressly finding facts that went beyond those found by the jury and that did not consist of merely finding that respondent had prior convictions. In addition to finding that respondent had been convicted of multiple felony offenses, the judge's written order found that six facts supported the finding that extended-term sentences were necessary for the protection of the public. First, respondent "was on parole" in another matter "when he committed the instant offenses." Second, he had "a history of substance abuse." Third, he had "a history of assaultive and threatening behavior." Fourth, "[s]hortly before the instant incident[,]" he had "abused drugs." Fifth, when "[u]nder extreme stress and impairment from drugs[,]" he was "unable to control his behavior." And, sixth, he had ready "access to firearms." Id. at a33.

4. Nor do the petitioners indicate the jury-degrading effect that extending respondent's maximum terms of imprisonment had in this case. As a result of finding the facts noted above, the judge sentenced respondent to imprisonment for life with the possibility of parole on the attempted manslaughter and the use-of-a-firearm-in-the-commission-of-a-separate-felony offenses under Counts 4 and 13. As

for the attempted manslaughter offense, such a sentence is the same sentence that would have been applicable to attempted second-degree murder. The jury, however, convicted respondent of only attempted manslaughter, not murder, under Count 4. See id. at a17-a19.

As for Count 13's use-of-a-firearm-in-the-commission-of-a-separate-felony offense, the life sentence was commensurate with, if not in excess of, the term that would have resulted, had there been no merger, of ordering the sentences on Counts 5, 6, 7, and 13 to run consecutively. Had there been no merger, the kidnapping convictions would have carried ten-year sentences and the unlawful imprisonment offense would have carried a five-year sentence. See Haw. Rev. Stat. §§ 706-660, 707-720(3), and 707-721(2). Run consecutively to the twenty-year term that the jury's verdict authorized on Count 13 and to each other, the resulting term of imprisonment would have been forty-five years. The judge's life sentence on Count 13 had the functional effect, then, of not only disregarding the jury's finding that the kidnapping victim had been released unharmed in a safe place. It also effectively abrogated the jury's factual findings merging the kidnapping and unlawful imprisonment offenses with the use-of-a-firearm offense.

The judge sentenced respondent to twenty years' imprisonment on the attempted first-degree assault and felon-in-possession-of-a-firearm offenses under Counts 2 and 9. At least as to the attempted first-degree assault offense, such a

sentence is the same sentence that would have been applicable to attempted manslaughter. Attempted manslaughter was an included offense of the murder offense charged in Count 2. But again, the jury *declined* to convict respondent of committing attempted manslaughter under this count. See Res. App. at a10-a13.

Finally, the judge sentenced respondent to ten years' imprisonment on the reckless endangering offenses under Counts 3, 10, 11, and 12 and the terroristic threatening offense under Count 8. At least as to the reckless endangering offense under Count 3, such a sentence was the same sentence that would have been applicable to a greater offense that the jury *declined* to convict respondent of committing. See id. at a14-a17.

By submitting additional facts to a judge, the State succeeded in imposing sentences on respondent that the jury could have authorized, but which the jury expressly opted not to authorize.

5. The petitioners, furthermore, misstate the Hawaii Supreme Court's decision in respondent's case. In Kaua I, *supra*, the Hawaii Supreme Court did *not* hold "that, under Haw. Rev. Stat. [§] 706-662(4)(a), the *sole* determining factor that subjected Kaua to an extended term of imprisonment as a multiple offender was Kaua's prior conviction." Pet. at 4 (emphasis added). Nor did the Hawaii Supreme Court hold "that the 'necessary for the protection of the public' determination *was not an Apprendi type fact* that needed to be found by the jury." Id. (emphasis added).

The Hawaii Supreme Court reaffirmed "settled" state law in Kaua I. Kaua I, 72 P.3d at 481 (App. at 54). As construed in prior cases and reaffirmed in Kaua I, Hawaii's extended-term sentencing statutes lay out a "*two step* process" -- not a single, prior-conviction-related, step. Id. (emphasis added). This two-step process, moreover, is one "in which a sentencing court *must* engage in order to impose an extended term sentence." Id. (emphasis added); see also Haw. Rev. Stat. §§ 706-661, 706-662, and 706-664.

The first step -- which is not at issue here -- necessitates a finding that a defendant is the type of defendant described in one of the aggravating criteria set out in Haw. Rev. Stat. § 706-662. See Kaua I, 72 P.3d at 481 (App. at 54). In respondent's case, this step of the process required the judge to find, as he did, that respondent was being sentenced for two or more felonies. See id.; Res. App. at a25 and a33; see also Haw. Rev. Stat. § 706-662(4). Not only, then, does this step itself not deal, as petitioners assert, with "*prior* convictions." It is not and never has been the "sole determining factor" justifying an extended-term sentence, for there is still a second step that must be taken before a judge is authorized to impose an extended-term sentence. Pet. at 4.

This second step, which *is* what is at issue here and which is the part of the process that defies Apprendi, "*requires* the sentencing court to determine whether 'the defendant's commitment for an extended term is necessary for the protection of

the public.'" Kaua I, 72 P.3d at 481 (App. at 54) (quoting State v. Huelsman, 588 P.2d 394, 398 (1979)) (emphasis added); see also Haw. Rev. Stat. § 706-662(4). State decisional law further requires that the judge must expressly support this public-protection finding with *additional* factual findings. See State v. Okumura, 894 P.2d 80, 109-110 (Haw. 1995). An extended-term sentence cannot be imposed absent the judge making these additional factual findings and determining that an extended term, as opposed to just an ordinary term, is necessary for the protection of the public. See Kaua I, 72 P.3d at 481-485 (App. at 54-64); Okumura, 894 P.2d at 109-110; Huelsman, 588 P.2d at 398-399.

Even after the district court granted respondent's petition for a writ of habeas corpus in this case and this Court decided Blakely v. Washington, 542 U.S. 296 (2004), the Hawaii Supreme Court hewed to the view that such additional fact-finding must be made, by a judge, in order to justify imposing an extended-term sentence. See State v. Rivera, 102 P.3d 1044, 1048 & n. 7 (Haw. 2004) (reaffirming Kaua I, "declin[ing] to follow the district court's analysis" in Kaua v. Frank, 350 F.Supp.2d 848 (D. Haw. 2004) ("Kaua II"), and holding that the Hawaii Supreme Court's "'intrinsic-extrinsic' analysis[[1]] culminating in Kaua[I] is compatible with

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[1] The Hawaii Supreme Court's "intrinsic-extrinsic analysis" for determining who, judge or jury, gets to decide any particular sentence-enhancing fact is discussed below.

both Blakely and Apprendi"); see also id. at 1058 (reaffirming that imposing an extended-term sentence is "a two-step process," the second step of which "requires the sentencing court to determine whether the defendant's commitment for an extended term is necessary for protection of the public"); id. at 1060 ("[a]dmittedly, a sentencing court's imposition of an extended term sentence requires the determination that it is 'necessary for the protection for the public'" (quoting Haw. Rev. Stat. § 706-662)).

It is true that a bare majority of the Hawaii Supreme Court in Rivera (a post-Kaua I case) remarked that, in *addition* to the public-protection finding and any necessary supporting findings, "the sole determining factor *remaining* that increases the [defendant's] penalty" under Haw. Rev. Stat. § 706-662(4) is a conviction-related fact that "mirrors the prior conviction exception." Id. at 1061 (emphasis added). Specifically, the conviction-related fact *remaining* to be found in addition to the public-protection finding (and its supporting facts) is "the fact that the defendant is a multiple offender" because he is being sentenced for two or more felony offenses. Id. But the Hawaii Supreme Court has *never* gone so far as to say -- as the State imputes it as having actually held in Kaua I -- that the *only* fact that justifies imposing an extended term sentence under Haw. Rev. Stat. § 706-662(4)'s 'multiple offender' criterion is the fact of prior (or contemporaneous) conviction. Nor has the Hawaii Supreme Court ever suggested that, once such a conviction-related finding is made,

the judge is authorized to impose an extended-term sentence without giving any further reason at all for doing so.

Rather, the Hawaii Supreme Court has espoused a mistaken view -- which has every appearance of being an obvious subterfuge to avoid acknowledging the unconstitutionality of Hawaii's extended-term sentencing scheme -- of what is constitutionally significant. And it has done so only in post-Kaua I cases and only in response to the rebuke of two of its own Justices in Rivera and of the district court and the Ninth Circuit in the present matter. A bare majority of the Hawaii Supreme Court has attempted to circumvent the unconstitutional aspects of the two-step procedure and the intrinsic-extrinsic rule it uses to designate who decides sentence-enhancing facts by stressing three aspects of Hawaii's extended-term sentencing scheme, which it believes saves the scheme from invalidity under Apprendi and its progeny. The first aspect is that a judge is not *required* to impose an extended-term sentence. The second aspect is that a judge must make a conviction-related f...ding before the defendant is exposed to a an extended-term sentence. And the third aspect is that "the 'necessary for protection of the public' determination alone is insufficient to subject a defendant to extended terms of imprisonment." See id. at 1057-1061; see also State v. Maugaotega, 114 P.3d 905 (Haw. 2005) (reaffirming Rivera and Kaua I, notwithstanding United States v. Booker, 543 U.S. 220 (2005)), petition for cert. filed (U.S. Oct. 27, 2005) (No. 05-7309); State v. White, 129 P.3d 1107 (Haw. 2006)

(reaffirming Maugaotega, Rivera, and Kaua I, notwithstanding Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006) (Kaua III)). But Rivera, Maugaotega, and White are not the state court decisions under review in this habeas proceeding. And the rule that the Hawaii Supreme Court applied in this case was not that the findings that the judge made under the second, public-protection step of the extended-term sentencing process were "not Apprendi type facts," nor even that the findings that the judge made were exempted facts of prior conviction.

The decision that the Hawaii Supreme Court made in *respondent's* case was that the public-protection finding and the facts supporting it "should be found by the sentencing judge" rather than a jury because those facts "implicate considerations completely 'extrinsic' to the elements of the offense[s] with which the defendant was charged and of which he was convicted." Kaua I, 72 P.3d at 484-485 (App. at 63). In other words, the Hawaii Supreme Court decided that such 'extrinsic' facts "fell outside the Apprendi rule" (not, as the petitioners contend, that they were not *factual* findings at all) and, thus, were "properly within the province of the sentencing court." Id. at 485 (App. at 64).

The rule, moreover, that the Hawaii Supreme Court applied in respondent's case was not that a jury must find any fact (other than a fact of prior conviction) that is essential to justify increasing a maximum sentence. Rather, the rule that the Hawaii Supreme Court applied was that only facts that are "intrinsic" to

the elements of the offenses with which the defendant is charged must go to a jury. Whereas, correlatively, *any* fact that is "extrinsic" to the statutorily-defined elements of a charged offense may be decided by a judge at sentencing, without regard to any sentence-increasing effect such a fact might have. See id. at 481-485 (App. at 54-64).

ARGUMENT

1. This Court's intervention in the present matter is unnecessary. The Ninth Circuit correctly held that Kaua I was contrary to clearly established federal law because the Hawaii Supreme Court applied a rule that contradicts the rule set forth in Apprendi. See Kaua III, 436 F.3d at 1060-1062 (App. at 5-10). The rule that the Hawaii Supreme Court applied in respondent's case was that facts that are "extrinsic" to the statutorily-defined elements of an offense may be decided by a judge, without regard to whether that fact, when found, has the effect of increasing a defendant's maximum sentence. See Kaua I, 72 P.3d at 484-485 (App. at 63-64). The Hawaii Supreme Court concluded that "[t]he facts foundational to Kaua's extended terms of imprisonment ... fell outside the Apprendi rule" because "the facts at issue in rendering an extended term sentencing determination" under Haw. Rev. Stat. § 706-662(4) "implicate considerations completely 'extrinsic' to the elements of the offense with which the defendant was charged and of which he was convicted." Id. "Accordingly," the Hawaii Supreme Court held, "they should be found by the sentencing judge" instead of a jury. Id.

The rule applicable to respondent's Sixth Amendment jury-trial claim was set forth in Apprendi: "[o]ther than the fact of a prior conviction, *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[.]" Apprendi, 530 U.S. at 494 (emphasis added). The Hawaii

Supreme Court, however, mistakenly construed Apprendi as having narrowly "held that findings that implicated 'elemental' facts requisite to imposing an enhanced sentence must be charged in the indictment, submitted to a jury, and proved by the prosecution beyond a reasonable doubt." Kaua I, 72 P.3d at 484 (App. at 61). The Ninth Circuit correctly held that the Hawaii Supreme Court's 'intrinsic-extrinsic' rule, which focuses on the 'elemental' form of a fact to determine who decides sentence-enhancing facts is contrary to Apprendi:

> Apprendi made irrelevant any distinction between facts based on their "intrinsic" or "elemental" quality for purposes of ascertaining whether the Sixth Amendment requires a jury to find them. Apprendi announced a new rule that focused on the *effect* of a court's finding of fact, not on the label that the statute or the court applied to that fact. The United States Supreme Court plainly set forth this new rule, stating that "the relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" If so, the Sixth Amendment requires a jury, not a judge to make the finding. Apprendi exempted only one finding -- the fact of a prior conviction -- from this "general rule."

Kaua III, 436 F.3d at 1061-1062 (App. at 8-9) (footnotes omitted); see also Apprendi, 530 US. at 490, 492-494 & n. 19.

The public-protection finding and the supporting findings of fact that the judge made to justify extending respondent's maximum terms of imprisonment were not facts of prior convictions. The Ninth Circuit properly held, therefore, that the

Hawaii Supreme Court's decision that such "extrinsic" facts were "outside" Apprendi's general rule was contrary to Apprendi itself. See Kaua III, 436 F.3d at 1062 (App. at 9-10). Since the Ninth Circuit reached the right result -- indeed, the only result Apprendi allows -- there is no need for this Court to intervene in the present matter.

2. The petitioners misleadingly assert that the Ninth Circuit disregarded state decisional law in deciding this case and misunderstood the Hawaii Supreme Court's Kaua I decision. The state decisional law that the petitioners claim the Ninth Circuit disregarded, however, consists primarily of cases that the Hawaii Supreme Court decided *after* Kaua I -- specifically, Rivera, *supra*, and White, *supra*.[2] These latter cases, however, are not the decision that was reviewed by the district court and the Ninth Circuit in the present matter under 28 U.S.C. § 2254(d).

Section 2254(d) provides that a petitioner can obtain habeas relief for a claim that "was adjudicated on the merits in State court proceedings" when "the adjudication of the claim ... resulted in a decision that was contrary to ... clearly

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[2] One other decision that the petitioners cite as having been disregarded by the Ninth Circuit is State v. Carvalho, 63 P.3d 405 (Haw. Ct. App. 2002). See Pet. at 9, 17, and 22. The Hawaii Supreme Court did *not* cite Carvalho in Kaua I for the proposition that the petitioners suggest -- for, that is, the notion that a prior conviction finding is the "sole determinant" of whether a defendant is eligible for an extended term sentence. Kaua I, 72 P.3d at 484 (App. at 62-63). It was, in fact, the Hawaii Supreme Court itself that, as it was and is entitled to, disregarded Carvalho on this point, not the Ninth Circuit.

established Federal law[.]" The adjudication of respondent's Apprendi claim resulted in the Kaua I decision of the Hawaii Supreme Court, not some other decision. The petitioners attempt to reconstruct Kaua I in the image of *dicta* in Rivera and other subsequent cases. The attempt should fail, for respondent is entitled to habeas relief if the decision in *his* case is contrary to Apprendi because the state courts applied a rule in *his* case that contradicts the rule articulated in Apprendi. To quip that the Hawaii Supreme Court applied a different rule in some *other* case and that *that* rule was not contrary to clearly established federal law is no answer to whether the rule applied in respondent's case was contrary to this Court's precedent.

But that is beside the point. For *each* of the Hawaii Supreme Court's subsequent cases addressing the issue purports to *reaffirm* the applicability of Kaua I's intrinsic-extrinsic rule, not displace it with some other 'rationale' -- as the petitioners label it. See, e.g., Rivera, 102 P.3d at 1048 ("this court's analysis and decision in Kaua[I] dispose of Rivera's" Apprendi claim); id. ("this court's 'intrinsic-extrinsic' analysis culminating in Kaua[I] is compatible with both Blakely and Apprendi"); Maugaotega, 114 P.3d at 908 ("this court's recent analysis and decision in ... Rivera ..., which reaffirmed this court's holding in ... Kaua[I] ... that Hawaii's extended-term sentencing scheme does not run afoul of Apprendi, disposes of Maugaotega's" Apprendi claim, but "we take this opportunity to reassert the viability of this court's analytical 'intrinsic-extrinsic' approach to Hawaii's statutory extended

term sentencing scheme" in light of Booker); White, 129 P.3d at 1109 ("our recent decisions in Rivera and Maugaotega -- which reaffirmed our holding in Kaua[I] that Hawaii's extended term sentencing scheme does not run afoul of Apprendi -- dispose of White's" Apprendi claim).

3. The petitioners engage in rather extensive revisionism, both of the facts presented by this case and of state and federal law, to portray Hawaii's extended-term sentencing scheme as a single-step process under which facts of prior conviction are the "sole" facts that a judge must find, beyond those already found by a jury, to justify imposing an extended term sentence. See, e.g., Pet. at 9 ("[w]hile the Hawaii Supreme Court did use the nomenclature 'intrinsic-extrinsic,' the Ninth Circuit fails to recognize that implicit in the state court decision is that the sole determinant in the imposition of an extended term sentence for purposes of Haw. Rev. Stat. [§] 706-662(4)(a) is the prior convictions"). As has been explained at length above, and as is readily apparent simply from reading Kaua I itself, this simply is not so.

4. It seems to be the petitioners' hope that this Court will perceive this case as involving a statutory scheme that is akin to New York's persistent offender sentencing scheme -- and, thus, will view the Ninth Circuit's decision affirming habeas relief in this case as conflicting with the Second Circuit's decision denying habeas relief to a New York prisoner in Brown v. Greiner, 409 F.3d 523 (2d

Cir. 2005), cert. denied, 126 S. Ct. 1566 (2006). See Pet. at 19-22. The highest appellate court in New York, however, has construed New York's persistent offender law as allowing a judge to increase a defendant's maximum sentence simply by making prior conviction findings. See People v. Rosen, 752 N.E.2d 844, 847 (N.Y. 2001). Notably, after making the requisite prior conviction finding, it appears that a New York judge may increase the defendant's sentence without giving any further reason for doing so. See id.; accord Blakely, 542 U.S. at 305. A Hawaii judge seeking to impose an extended-term sentence under Haw. Rev. Stat. § 706-662(4), however, cannot do so simply by making conviction-related findings and without giving any further reason for doing so. Rather, the Hawaii judge must make a further finding that such a sentence is necessary for the protection of the public and, moreover, must expressly support this finding with additional factual findings.

5. For nearly *thirty* years, the Hawaii Supreme Court has consistently construed Hawaii's extended-term sentencing scheme as involving a two-step process, the latter step of which requires the sentencing court to find that an extended-term sentence is necessary for the protection of the public. See Rivera, 102 P.3d at 1058, 1060; Kaua I, 72 P.3d at 481-485 (App. at 54-64); Huelsman, 588 P.2d at 398-399, 406-407. For some twelve years, the Hawaii Supreme Court has applied its 'intrinsic-extrinsic' rule for determining whether a jury or a judge must decide any particular sentencing-enhancing fact. See State v. Schroeder, 880 P.2d 192, 202-203

(Haw. 1994); see also State v. Tafoya, 982 P.2d 890, 899-900 (Haw. 1999). And over ten years ago, the Hawaii Supreme Court held that the sentencing court had to expressly support the "extrinsic" public-protection finding with additional findings of fact. See Okumura, 894 P.2d at 109-111. For the petitioners to suggest that the fact of a prior conviction is the "sole determinant" of whether a defendant is subjected to an extended-term sentence is, to say the least, a bit astounding.

Yet, petitioners insist that the Hawaii Supreme Court has 'impliedly' embedded such a construction of the extended-term statutes within its application of its intrinsic-extrinsic rule in respondent's case, as evinced in *subsequent* cases. But not only were these subsequent cases decided after Kaua I. They were decided by a bare majority of the Hawaii Supreme Court only after two fellow justices of that court, at least two district court judges, and a three-judge panel of the Ninth Circuit rebuked the bare majority for failing to grasp that the second step of the two-step process violates the Sixth and Fourteenth Amendments and is contrary to Apprendi. Even if, then, the petitioners were correct in this regard (and they aren't), the re-interpretation of the extended-term sentencing statutes that petitioners impute to the Hawaii Supreme Court would be little more than a rhetorical subterfuge, aimed at avoiding having to acknowledge that Hawaii's extended-term sentencing scheme results in unconstitutional sentences. Such an "obvious subterfuge" can and should

be disregarded in these proceedings. See Mullaney v. Wilbur, 421 U.S. 684, 691 n. 11 (1975).

6. The petitioners contend that one reason that this Court should grant certiorari in this matter is to resolve an *intra*-circuit split in the Ninth Circuit. See Pet. at 15-19. Such an intra-circuit split, however, is usually not a sufficient reason for this Court to intervene, given that any such split can be -- and probably should be -- first addressed by an *en banc* Court of Appeals. See Sup. Ct. R. 10; see also Davis v. United States, 417 U.S. 333, 340 (1974) (noting that the Court denied certiorari after the government argued that certiorari should be denied because the Court of Appeals could and should resolve any intra-circuit split); John Marshall Harlan, *Manning the Dikes*, 13 REC. OF THE N.Y.C. BAR ASS'N 541, 552 (1958) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself").

Be that as it may, the intra-circuit split that the petitioners identify involves whether a federal court may deny habeas relief by adopting a "rationale" that the state court failed to articulate in its decision adjudicating petitioner's federal claim. See Pet. at 15-19; see also Sims v. Rowland, 414 F.3d 1148, 1152 n. 2 (9th Cir. 2005) (noting "some latent confusion" over this issue in the Ninth Circuit decisions). The panel in the present matter did note that it could not deny the writ "by

positing an alternative reason for the state court's [decision] that is entirely distinct from the reason given by the state court, even if such a different reason might have justified the state court's action." Kaua III, 436 F.3d at 1060 (App. at 5-6) (quoting Van Lynn v. Farmon, 347 F.3d 735, 737 (9th Cir. 2003)). But the panel did not reject the petitioners' alternative argument for this reason alone. It *also* rejected the petitioner's alternative argument *on its merits*. See Id. at 1060-1061 (App. at 6-8). As such, the present matter is not a very good vehicle for resolving the intra-circuit split that petitioners identify, to the extent it truly exists in the first place.

But even if it were a good vehicle for doing so, the petitioners' characterization of the Hawaii Supreme Court's 'intrinsic-extrinsic' analysis as a "rationale" is misleading. As has been noted, the 'intrinsic-extrinsic' dichotomy was *the rule* that the Hawaii Supreme Court applied in reaching its *decision* that the public-protection finding and any of its supporting findings of fact need not be decided by a jury. It was not simply a "rationale." If the rule that the state court applies contradicts the rule this Court's precedent compelled it to apply, which is what occurred here, habeas relief is appropriate, as both the district court and the Ninth Circuit concluded. If, as the petitioners urge, a federal court may deny habeas relief under 28 U.S.C. § 2254(d)(1)'s "contrary to" clause by positing that a rule other than the one actually applied by the state court justifies doing so, then the standard this Court has articulated for granting relief under the "contrary to" clause is robbed

of any meaningful content. See Williams v. Taylor, 529 U.S. 302, 405 (2000) ("[a] state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases"). Petitioners' attempt to displace the underlying state court decision before this Court with some other, subsequent decisions that they (mistakenly) perceive as better supporting their position must fail. This Court "decide[s] the case before [it], not a different one." Georgia v. Randolph, 547 U.S. ---, 126 S. Ct. 1515, 1526 n. 8 (2006).

7. There is no need to hold this case while this Court decides Cunningham v. California, No. 05-6551, next term. California has a three-tiered sentencing system, under which a jury's verdict requires the judge to sentence the defendant to the "middle term" unless the judge finds that some aggravating factor justifies imposing the "upper term." In Cunningham, this Court will decide whether California's system contravenes Apprendi and its progeny.

The California Supreme Court has espoused the view that it does not, primarily for two reasons. The first is that the California Supreme Court believes it makes a constitutionally significant difference that a judge is never required to impose an upper term sentence, even after finding that there are aggravating factors that would justify it. See People v. Black, 113 P.3d 534, 548 (Cal. 2005), petition for cert. filed (U.S. Sept. 28, 2005) (No. 05-6793). It does not. See Blakely, 542 U.S.

at 305 n. 8 ("[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence"). The second is that the California Supreme Court believes that it makes a constitutionally significant difference that a judge is not required to find a *particular* fact and that no statute mandates the fact or facts the judge must find to justify an upper-term sentence. See Black, 113 P.3d at 544. This, too, makes no difference. See Blakely, 542 U.S. at 305 ("[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact ..., one of several specified facts ..., or *any* aggravating fact ..., it remains the case that the jury's verdict alone does not authorize the sentence").

In cases decided after Kaua I, the Hawaii Supreme Court has embraced similar beliefs about the scope of this Court's Apprendi jurisprudence. See, e.g., Rivera, *supra*. It may be that this Court should correct the Hawaii Supreme Court's mistaken views in this regard in an appropriate case, such as Maugaotega, *supra*. In the present matter, however, the Ninth Circuit has already corrected the violation of respondent's right to jury trial, and, thus, there is no need for this Court to intervene in this case. Perhaps more importantly, this case does not afford an opportunity to reach the Hawaii Supreme Court's mistaken views in this regard at all, given that the Hawaii Supreme Court did not espouse those views in respondent's case, but only

expressed them in other cases that were not before the district court and the Ninth Circuit in this habeas proceeding.

8. In sum, the petitioners are not mounting an assault on the Ninth Circuit's decision in this case. Rather, they seek to revisit -- and, in doing so, eviscerate -- the Apprendi rule itself. The petitioners, that is, seek to *expand* the prior conviction exception to encompass facts that do not even remotely relate to prior convictions. The prior conviction exception, if a legitimate exception to Apprendi's general rule at all, is a narrow one. This Court should not, therefore, grant certiorari in the present matter to expand it, as petitioners urge, far beyond its already constitutionally doubtful limits. See Shepard v. United States, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in judgment); Apprendi, 530 U.S. at 520-521 (Thomas, J., concurring); Almendarez-Torres v. United States, 523 U.S. 224, 248-249 (1998) (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting).

CONCLUSION

Respondent requests that this Court GRANT his Motion for Leave to Proceed *In Forma Pauperis* but DENY the petitioners' Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, June 26, 2006.

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Indictment Presented
and Filed
MAR - 3 1999 4:05 PM
Date Time
C. ASATO, Clerk
FIRST CIRCUIT COURT, STATE OF HAWAII

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	CR. NO. 99-0404
v.	COUNT 1: ATTEMPTED MURDER IN THE FIRST DEGREE (§ 705-500, 707-701(1)(a) & 706-656, H.R.S.)
WAYMAN K. KAUA,	COUNTS 2--4: ATTEMPTED MURDER IN THE FIRST DEGREE (§ 705-500, 707-701(1)(b) & 706-656, H.R.S.)
Defendant.	COUNT 5: KIDNAPPING (§ 707-720(1)(b) & 706-660.1, H.R.S.)
	COUNT 6: KIDNAPPING (§ 707-720(1)(e) & 706-660.1, H.R.S.)
	COUNT 7: KIDNAPPING (§ 707-720(1)(f) & 706-660.1, H.R.S.)
	COUNT 8: TERRORISTIC THREATENING IN THE FIRST DEGREE (§ 707-716(1)(d), H.R.S.)
	COUNT 9: OWNERSHIP OR POSSESSION PROHIBITED OF ANY FIREARM OR AMMUNITION BY A PERSON CONVICTED OF CERTAIN CRIMES (§ 134-7(b) and (h), H.R.S.)

)	COUNTS 10--12:
)	RECKLESS ENDANGERING IN
)	THE FIRST DEGREE
)	(§ 707-713, H.R.S.)
)	COUNT 13:
)	CARRYING, USING OR
)	THREATENING TO USE A
)	FIREARM IN THE COMMISSION
)	OF A SEPARATE FELONY
)	(§ 134-6(a) and (e), H.R.S.)
)	
)	INDICTMENT

INDICTMENT

The Grand Jury charges:

COUNT 1: On or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the deaths of David Brown, Samuel Asui, and Daniel Aoki, more than one person, in the same or separate incident, thereby committing the offense of Attempted Murder in the First Degree, in violation of Sections 705-500, 707-701(1)(a), and 706-656 of the Hawaii Revised Statutes.

COUNT 2: On or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the death of David Brown, a peace officer, arising out of the performance of official duties, thereby committing the offense of Attempted Murder in the First Degree, in violation of Sections 705-500, 707-701(1)(b), and 706-656 of the Hawaii Revised Statutes.

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COUNT 3: On or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the death of Samuel Asui, a peace officer, arising out of the performance of official duties, thereby committing the offense of Attempted Murder in the First Degree, in violation of Sections 705-500, 707-701(1)(b), and 706-656 of the Hawaii Revised Statutes.

COUNT 4: On or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally engage in conduct which is a substantial step in a course of conduct intended or known to cause the death of Daniel Aoki, a peace officer, arising out of the performance of official duties, thereby committing the offense of Attempted Murder in the First Degree, in violation of Sections 705-500, 707-701(1)(b), and 706-656 of the Hawaii Revised Statutes.

COUNT 5: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally or knowingly restrain Victoria S. Bart, with intent to use her as a shield or hostage, thereby committing the offense of Kidnapping, in violation of Section 707-720(1)(b) of the Hawaii Revised Statutes, and where he had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of this felony, whether the firearm was loaded or not, and whether operable or not, he is subject to Sentence of Imprisonment for Use of a Firearm, Semiautomatic Firearm or

Automatic Firearm in a Felony, in accordance with Section 706-660.1 of the Hawaii Revised Statutes.

COUNT 6: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally or knowingly restrain Victoria S. Bart, with intent to terrorize her or a third person, thereby committing the offense of Kidnapping, in violation of Section 707-720(1)(e) of the Hawaii Revised Statutes, and where he had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of this felony, whether the firearm was loaded or not, and whether operable or not, he is subject to Sentence of Imprisonment for Use of a Firearm, Semiautomatic Firearm or Automatic Firearm in a Felony, in accordance with Section 706-660.1 of the Hawaii Revised Statutes.

COUNT 7: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally or knowingly restrain Victoria S. Bart, with intent to interfere with the performance of a governmental or political function, thereby committing the offense of Kidnapping, in violation of Section 707-720(1)(f) of the Hawaii Revised Statutes, and where he had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of this felony, whether the firearm was loaded or not, and whether operable or not, he is subject to Sentence of Imprisonment for Use of a Firearm, Semiautomatic Firearm or Automatic Firearm in a Felony,

in accordance with Section 706-660.1 of the Hawaii Revised Statutes.

COUNT 8: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA threatened, by word or conduct to cause bodily injury to Victoria S. Bart, with the use of a dangerous instrument, to wit, a semi-automatic firearm as defined in Section 706-660.1 of the Hawaii Revised Statutes, in reckless disregard of the risk of terrorizing said Victoria S. Bart, thereby committing the offense of Terroristic Threatening in the First Degree, in violation of Section 707-716(1)(d) of the Hawaii Revised Statutes.

COUNT 9: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA, who has been convicted in the State of Hawaii or elsewhere of having committed a felony, did own, possess, or control any firearm or ammunition therefor, thereby committing the offense of Ownership or Possession Prohibited of Any Firearm or Ammunition By a Person Convicted of Certain Crimes, in violation of Section 134-7(b) and (h) of the Hawaii Revised Statutes.

COUNT 10: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally fire a semi-automatic firearm as defined in Section 706-660.1 of the Hawaii Revised Statutes, in a manner which recklessly placed Ricki S. Aoki in danger of death or serious bodily injury.

thereby committing the offense of Reckless Endangering in the First Degree, in violation of Section 707-713 of the Hawaii Revised Statutes.

COUNT 11: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally fire a semi-automatic firearm as defined in Section 706-660.1 of the Hawaii Revised Statutes, in a manner which recklessly placed Daniel Y. Kim in danger of death or serious bodily injury, thereby committing the offense of Reckless Endangering in the First Degree, in violation of Section 707-713 of the Hawaii Revised Statutes.

COUNT 12: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did intentionally fire a semi-automatic firearm as defined in Section 706-660.1 of the Hawaii Revised Statutes, in a manner which recklessly placed David A. Tieche in danger of death or serious bodily injury, thereby committing the offense of Reckless Endangering in the First Degree, in violation of Section 707-713 of the Hawaii Revised Statutes.

COUNT 13: On or about the 29th day of October, 1998 to and including the 30th day of October, 1998, in the City and County of Honolulu, State of Hawaii, WAYMAN K. KAUA did knowingly carry on his person or have within his immediate control or intentionally use or threaten to use a firearm while engaged in the commission of a separate felony, whether the firearm was

loaded or not, and whether operable or not, thereby committing the offense of Carrying, Using or Threatening to Use a Firearm in the Commission of a Separate Felony, in violation of Section 134-6(a) and (e) of the Hawaii Revised Statutes, and the separate felony is Kidnapping, in which the elements are that he did intentionally or knowingly restrain Victoria S. Bart with the intent to (1) use her as a shield or hostage, and/or (2) terrorize her or a third person, and/or (3) interfere with the performance of any governmental or political function, in violation of Section 707-720(1)(b) or (e) or (f) of the Hawaii Revised Statutes, and any lesser-included felony offense of Kidnapping.

A True Bill found this day: March 03 1999.

Deputy Prosecuting Attorney
City and County of Honolulu

Foreperson of the Grand Jury

state of mind with which the acts are done or omitted.

But what a person does or fails to do may or may not indicate the state of mind with which he does or refrains from doing an act.

During the trial items were received into evidence as exhibits. These exhibits will be sent into the jury room with you when you begin to deliberate.

In Count 1 of the indictment, the defendant, Wayman K. Kaua is charged with the offense of Attempted Murder in the First Degree.

A person commits the offense of Attempted Murder in the First Degree if he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause the death of more than one person in the same or separate incident.

There are three material elements of the offense of Attempted Murder in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That on or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, the defendant intentionally engaged in conduct; and

2. That the conduct was a substantial step in a course of conduct intended or known by the defendant

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to cause the deaths of David Brown, Samuel Asui and Daniel Aoki, more than one person; and

3. That the defendant intended to cause the death of more than one person in the same or separate incident.

In Count 1 of the indictment, if you find that the prosecution has proven beyond a reasonable doubt all of the elements of Attempted Murder in the First Degree, then you must then determine whether at that time the defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances of which the defendant was aware or as the defendant believed them to be.

The prosecution must prove beyond a reasonable doubt that the defendant was not at the time of the offense under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If the prosecution has done so, then you must return a verdict of guilty of Attempted Murder in the First Degree.

If the prosecution has not done so, then you

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must return a verdict of guilty of Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance.

In Count 2 of the indictment, the defendant Wayman K. Kaua is charged with the offense of Attempted Murder in the First Degree.

A person commits the offense of Attempted Murder in the First Degree if he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause the death of a peace officer arising out of the performance of official duties.

There are four material elements of the offense of Attempted Murder in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These four elements are:

1. That on or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, the defendant intentionally engaged in conduct; and

2. That the defendant's conduct was a substantial step in a course of conduct intended or known by the defendant to cause the death of David Brown, a peace officer, arising out of the performance of official duties; and

3. That the defendant was aware that David Brown was a peace officer; and

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4. That the defendant acted intentionally or knowingly to cause the death of David Brown because of the peace officer's performance of official duties.

In Count 2 of the indictment, if you find that the prosecution has proven beyond a reasonable doubt all of the elements of Attempted Murder in the First Degree, then you must then determine whether at that time the defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances of which the defendant was aware or as the defendant believed them to be.

The prosecution must prove beyond a reasonable doubt that the defendant was not at the time of the offense under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If the prosecution has done so, then you must return a verdict of guilty of Attempted Murder in the First Degree.

If the prosecution has not done so, then you must return a verdict of guilty of Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance.

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In Count 2 of the indictment if, and only if, you find the defendant not guilty of Attempted Murder in the First Degree and Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance, or you are unable to reach a unanimous verdict as to these offenses, then you must determine if the defendant is guilty or not guilty of the included offense of Attempted Assault in the First Degree.

A person commits the offense of Attempted Assault in the First Degree if he intentionally engages in conduct which is a substantial step in a course of conduct intended or known by the defendant to cause serious bodily injury to another person.

There are three material elements of the offense of Attempted Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.

These three elements are:

1. That on or about October 29, 1998, in the City and County of Honolulu, the defendant intentionally engaged in conduct.

2. That the conduct was a substantial step in a course of conduct intended or known by the defendant to cause serious bodily injury to David Brown.

In Count 2 of the indictment if, and only if,

you find the defendant not guilty of Attempted Murder in the First Degree and Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance and of attempted -- and of the included offense of Attempted Assault in the First Degree, or you are unable to reach a unanimous verdict as to these offenses, then you must determine if the defendant is guilty or not guilty of the included offense of reckless endangering in the first degree.

A person commits the offense of Reckless Endangering in the First Degree if he intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury.

There are three material elements of the offense of Reckless Endangering in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These three elements are:

1. That on or about October 29, 1998, in the City and County of Honolulu, the defendant fired a firearm; and

2. That the defendant did so intentionally; and

3. That the defendant did so in a manner which recklessly placed David Brown in danger of death or serious bodily injury.

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In Count 3 of the indictment, the defendant Wayman K. Kaua is charged with the offense of Attempted Murder in the First Degree. A person commits the offense of Attempted Murder in the First Degree if he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause the death of a peace officer arising out of the performance of official duties.

There are four material elements of the offense of Attempted Murder in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These four elements are:

1. That on or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, the defendant intentionally engaged in conduct; and

2. That the defendant's conduct was a substantial step in a course of conduct intended or known by the defendant to cause the death of Samuel Asui, a peace officer, arising out of the performance of official duties; and

3. That the defendant was aware that Samuel Asui was a peace officer; and

4. That the defendant acted intentionally or knowingly to cause the death of Samuel Asui because of the peace officer's performance of official duties.

In Count 3 of the indictment, if you find beyond a reasonable doubt that the prosecution has proven all of the elements of Attempted Murder in the First Degree, then you must then determine whether at that time the defendant was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.

The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances of which the defendant was aware or as the defendant believed them to be.

The prosecution must prove beyond a reasonable doubt that the defendant was not at the time of the offense under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. If the prosecution has done so, then you must return a verdict of guilty of Attempted Murder in the First Degree.

If the prosecution has not done so, then you must return a verdict of guilty of Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance.

In Count 3 of the indictment if, and only if, you find the defendant not guilty of Attempted Murder in the First Degree or Attempted Manslaughter Based Upon

Extreme Mental or Emotional Disturbance, or you are unable to reach a unanimous verdict as to these offenses, then you must determine if the defendant is guilty or not guilty of the included offense of Attempted Assault in the First Degree.

A person commits the offense of Attempted Assault in the First Degree if he intentionally engages in conduct which is a substantial step in a course of conduct intended or known by the defendant to cause serious bodily injury to another person.

There are two material elements of the offense of Attempted Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These two elements are:

1. That on or about October 29, 1998, in the City and County of Honolulu, the defendant intentionally engaged in conduct.

2. That the conduct was a substantial step in a course of conduct intended or known by the defendant to cause serious bodily injury to Samuel Asui.

In Count 3 of the indictment if, and only if, you find the defendant not guilty of Attempted Murder in the First Degree and Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance and the included offense of Attempted Assault in the First Degree, or you

are unable to reach a unanimous verdict as to these offenses, then you must determine if the defendant is guilty or not guilty of the included offense of Reckless Endangering in the First Degree.

A person commits the offense of Reckless Endangering in the First Degree if he intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury.

There are three material elements of the offense of Reckless Endangering in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These three elements are:

1. That on or about October 29, 1998, in the City and County of Honolulu, the defendant fired a firearm; and

2. That the defendant did so intentionally; and

3. That the defendant did so in a manner which recklessly placed Samuel Asui in danger of death or serious bodily injury.

In Count 4 of the indictment the defendant Wayman K. Kaua is charged with the offense of Attempted Murder in the First Degree.

A person commits the offense of Attempted Murder in the First Degree if he intentionally engages in

conduct which is a substantial step in a course of conduct intended or known to cause the death of a peace officer arising out of the performance of official duties.

There are four material elements of the offense of Attempted Murder in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These four elements are:

1. That on or about the 29th day of October, 1998, in the City and County of Honolulu, State of Hawaii, the defendant intentionally engaged in conduct; and

2. That the defendant's conduct was a substantial step in a course of conduct intended or known by the defendant to cause the death of Daniel Aoki, a peace officer, arising out of the performance of official duties; and

3. That the defendant was aware that Daniel Aoki was a peace officer; and

4. That the defendant acted intentionally or knowingly to cause the death of Daniel Aoki because of the peace officer's performance of official duties.

In Count 4 of the indictment, if you find that the prosecution has proven beyond a reasonable doubt all of the elements of Attempted Murder in the First Degree, then you must then determine whether at that time the defendant was under the influence of extreme mental or

emotional disturbance for which there is a reasonable explanation.

The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances of which the defendant was aware or as the defendant believed them to be.

The prosecution must prove beyond a reasonable doubt that the defendant was not at the time of the offense under the influence of extreme mental or emotion disturbance for which there is a reasonable explanation.

If the prosecution has done so, then you must return a verdict of guilty of Attempted Murder in the First Degree. If the prosecution has not done so, then you must return a verdict of guilty of Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance.

In Count 4 of the indictment if, and only if, you find the defendant not guilty of Attempted Murder in the First Degree and Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance, or you are unable to reach a unanimous verdict as to these offenses, then you must determine if the defendant is guilty or not guilty of the included offense of Attempted Assault in the

First Degree.

A person commits the offense of Attempted Assault in the First Degree if he intentionally engages in conduct which is a substantial step in a course of conduct intended or known by the defendant to cause serious bodily injury to another person.

There are two material elements of the offense of Attempted Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These two elements are:

1. That on or about October 29, 1998, in the City and County of Honolulu, the defendant intentionally engaged in conduct.

2. That the conduct was a substantial step in a course of conduct intended or known by the defendant to cause serious bodily injury to Daniel Aoki.

In Count 4 of the indictment if, and only if, you find the defendant not guilty of Attempted Murder in the First Degree and of Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance and of the included offense of Attempted Assault in the First Degree, or you are unable to reach a unanimous verdict as to these offenses, then you must determine if the defendant is guilty or not guilty of the included offense of Reckless Endangering in the First Degree.

A person commits the offense of Reckless Endangering in the First Degree if he intentionally en -- if he intentionally fires a firearm in a manner which recklessly places another person in danger of death or serious bodily injury.

There are three material elements of the offense of Reckless Endangering in the First Degree, each of which the prosecution must prove beyond a reasonable doubt. These three elements are:

1. That on or about October 29, 1998, in the City and County of Honolulu, the defendant fired a firearm; and

2. That the defendant did so intentionally; and

3. That the defendant did so in a manner which recklessly placed Daniel Aoki in danger of death or serious bodily injury.

When the prosecution charges an attempt to commit a crime, the burden is also on the prosecution to prove beyond a reasonable doubt that the defendant intentionally engaged in conduct which under the circumstances as he believed them to be constituted a substantial step in a course of conduct intended to culminate in the commission of a crime.

Conduct shall not be considered a substantial

step unless it is strongly corroborative of the defendant's criminal intent. Serious bodily injury means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

If you find the defendant guilty as charged in Count 1 of the offense of Attempted Murder in the First Degree or guilty in Count 1 of Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance, then you shall not consider whether defendant is guilty or not guilty in Counts 2, 3 and 4 of the offenses of Attempted Murder in the First Degree, Attempted Manslaughter or any of the included offenses.

If you find the defendant guilty as charged in Counts 2, 3 or 4 of Attempted Murder in the First Degree or guilty of Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance or guilty of any of the included offenses, then you shall not consider whether the defendant is guilty or not guilty of Count 1, Attempted Murder in the First Degree or Attempted Manslaughter Based Upon Extreme Mental or Emotional Disturbance.

In Count 5 of the indictment, the defendant Wayman K. Kaua is charged with the offense of kidnapping.

that would be given to a first-time offender. If a person walked into a convenience store, pointed a semiautomatic gun at that person and said I want your money, and walks out of there, that person would get a 20-year term, 15 years without possibility of parole, not somebody who has distinguished themselves with three felony convictions, including two hostage-takings, probably a first in the state of Hawaii.

Let me suggest to you that since you have had a great deal of experience in extending terms or having people come before you and the defense suggested to you that those people were in worse shape, it would be hard to find somebody more worthy of an extended term of incarceration than the defendant who sits before you today. His time may not have come that day in Pearl City, but his time has come this morning. And the time for him is to spend the rest of his life isolated from people who he can hurt and endanger and try and injure.

Thank you.

THE COURT: You may have a seat. It's going to take me some time.

I've got to dispose of the legal matters first. And the first legal matter involves the issue of merger. In summary, the jury found the defendant not guilty of Count I and guilty of Attempted Assault in the

First Degree, Count II, guilty of Reckless Endangering in the First Degree, Count III, guilty of Attempted Manslaughter, Count IV, guilty of Kidnapping as a class B felony, Count V, guilty of Unlawful Imprisonment in the Second Degree, Count VI, guilty of Kidnapping as a class B felony, Count VII, guilty of Terroristic Threatening in the First Degree, Count VIII, guilty of Ownership or Possession Prohibited of any Firearm or Ammunition by a Person Convicted of Certain Crimes, Count IX, guilty of Reckless Endangering in the First Degree, Counts X through XII, and guilty of Carrying, Using, or Threatening to Use a Firearm in the Commission of a Separate Felony, Count XIII. Based on the jury's determinations, the court will merge Counts V, VI, and VII with Count XIII. And because of that merger, the court will dismiss, without prejudice, Counts V, VI, and VII and find and adjudge the defendant guilty of Count XIII.

Before we get to the discretionary matters, again staying with the legal matters, the State has filed these motions: Motion for Extended Terms of Imprisonment, Motion for Sentencing of Repeat -- as a Repeat Offender, and a Motion for Sentencing for Use of a Semiautomatic Firearm. The defense has essentially conceded that the defendant is subject of sentencing as a repeat offender and, also, subject of sentencing to mandatory minimum

terms for the defendant's use of a semiautomatic firearm in the commission of these felonies. Therefore, the court will grant both of the State's motions.

On the Motion for Sentencing to Extended Terms of Imprisonment, as far as the first prong is concerned, that is, whether or not the defendant qualifies, again, the defense has conceded. He is a multiple offender, and he was represented by legal counsel. All of those facts have been proven by the prosecution beyond a reasonable doubt.

On the discretionary matters, first, on the Motion for an Extended Term of Imprisonment, discretionary is such term necessary for the protection of the public. The second discretionary issue before the court, as the prosecution is asserting, the defendant should be given consecutive terms. So those are, in the court's view, the only discretionary matters before the court. Of course, the Presentence Diagnosis and Report will be part of the record for any determination of the court's exercise of that discretion.

Now, I believe that we have a dispute in terms of the defendant's age. It's reported to be 31. On the other hand, it's reported to be 35. As the prosecution has noted, the defendant did have a matter in adult court waived from Family Court, and it was a robbery

matter.

Defendant's history suggests the following; from an early age, alcoholism, substance abuse. And the substance abuse is of great concern, because as a youth, it went from marijuana to cocaine, opiates, and then crystal methamphetamine. The use sometimes was sporadic. But when the defendant abused the drugs, it was very severe. And undoubtedly, in the days or weeks surrounding these offenses and perhaps shortly before these offenses, the defendant was abusing drugs in the court's judgment.

Now, his history also suggests assaultive behavior, threatening behavior. We have abuse of household member, terroristic threatening, other incidents which have been reported or mentioned by the prosecution. Basically, it's the court's conclusion that while under the influence or while under extreme stress, the defendant is unable to control his behavior. And that impairment has brought about assaultive behavior as well as threatening behavior.

Of more concern is that in the defendant's history, his access to firearms. Before these incidents, the defendant did have a firearm conviction. And reportedly on other occasions, he resorted to use of firearms, although in one incident, I understand that it's been disputed. And, of course, in the incidents before

the court, the defendant used an assault rifle.

I've mentioned the negatives because the defendant's history also indicates a positive. In spite of his behavior, he still has a loving family, and his family supports him, and I'm sure that he loves his family. He's active in his religion. He has support of church members. So it's not all negative in the defendant's history. There are a lot of positives there. It's been reported to me in chambers that even while on parole, the defendant coached football, and he was well-liked by the youth, and they were very supportive. I understand that the youth found him to be a very friendly, very supportive person, someone easy to get along with, someone that they trusted. So we have a bright, a positive, a negative, and a dark. Now I've got to balance all of that.

One thing I want to mention is that in presiding over the trial, it's my judgment that Vicky Bart was severely traumatized, and she's still undergoing that trauma. She may not realize it. But in my experience, I've seen people who have gone through that. And it's also my judgment that during this incident, she, in some respect, identified with her captor. So there was injury. And I think -- and she may not have been -- I don't know whether or not she's receiving that treatment. For her, I

think that she should go and receive that counseling so that she can put her life together. But in any event, I think that -- it's my belief, and it's a firm one, that she was severely traumatized from that incident.

Now, as I recited this history, I can only reach a conclusion that in balancing all of these factors and in rendering this sentence, I'm considering the interest of the community, and I'm also considering the interest of the individual. For the defendant, I do want to give him some hope. For his family, I want to give them some hope. For the community, I also want to give some protection, because basically it does come down to the individual.

And I don't agree with the defense that it was only the defendant who was hurt in this incident. He used a rifle at a long range, and I do not believe that the defendant was experienced with use of that assault rifle. Shooting at a long range with people in the vicinity, without any kind of experience -- and certainly he didn't show any kind of experience; otherwise, he would have hit that police officer who was hiding behind his vehicle -- other people could have been hurt by wild shots. And these were shots in the direction of a police officer, and I kind of think that defendant knew that it was a police officer who was there. Certainly he had the

assistance of his spouse in identifying who these people were outside and what capacity they were out there. It's not only the police officer who could have been shot, but it could have been other people. And I understand that there were children in the vicinity. He may not have intended to hit any children. But in the manner that the rifle was being fired, there's also a strong -- always a strong possibility that minors could have been hurt as well as other innocent bystanders.

Basically, the defendant, I believe when I look at the factors and consider his character, his history, his attitude, and the need for a structured environment, I believe that it's necessary for the protection of the public to impose the extended terms. The hope that I leave with the defendant and his family is to work with the Hawaii Paroling Authority so that eventually the defendant can be reunited with his family and his friends within the community.

Now, I also believe that State's request for consecutive mandatory minimums is unduly harsh considering the present circumstances and considering the court's granting of the State's Motion for an Extended Term of Imprisonment. And therefore, the court will not impose any consecutive terms. As the court indicated, I still think that, and I still believe that, there are positives

in defendant's history and that the defendant is fully capable of controlling his behavior if he can remain away from the illicit substances.

And therefore, it is the judgment and sentence of the court that the defendant be committed to the custody of the Director of the Department of Public Safety for indeterminate terms extended as follows:

Count II, 20 years with a mandatory minimum term of three years and four months as a repeat offender and mandatory minimum term of 10 years for use of a semiautomatic firearm; Counts III, X, XI, and XII, Reckless Endangering in the First Degree, extended to 10 years each with a mandatory minimum term of one year and eight months as a repeat offender and mandatory minimum term of five years for use of a semiautomatic firearm; Count IV, Attempted Manslaughter, extended to life imprisonment with a possibility of parole with mandatory minimum term of six years and eight months as a repeat offender and mandatory minimum term of 15 years for the use of a semiautomatic firearm. Count V, VI, and VII, as indicated, have been merged with Count XIII. Count VIII, an extended term of 10 years imprisonment with a mandatory minimum term of one year and eight months as a repeat offender and a mandatory minimum term of five years for use of a semiautomatic firearm; Count IX, Ownership or

Possession Prohibited of any Firearm or Ammunition by a Person Convicted of Certain Crimes, extended to 20 years imprisonment with a mandatory minimum term of three years and four months as a repeat offender; and Count XIII, Carrying, Using, or Threatening to Use a Firearm in the Commission of a Separate Felony, extended to life imprisonment with the possibility of parole with a mandatory minimum term of six years and eight months as a repeat offender. All sentences will be served concurrent to each other but consecutive to any sentence that the defendant is now serving. The mittimus will issue forthwith, and the defendant is remanded to the custody of the sheriff for execution of the court's sentence.

Are there any questions?

MR. CARLISLE: Nothing from the State, Your Honor.

THE COURT: Mr. Eddins.

MR. EDDINS: No, Your Honor.

THE COURT: Court's in recess.

(The proceedings concluded at 11:08 a.m.)

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State of Hawaii

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1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2000 APR -5 PM 12:07

CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	CR. NO. 99-0404
vs.	COUNT II: ATTEMPTED ASSAULT IN THE FIRST DEGREE COUNTS III, X, XII: RECKLESS ENDANGERING IN THE FIRST DEGREE
WAYMAN KAUA,	COUNT IV: ATTEMPTED MANSLAUGHTER
Defendant.	COUNTS V & VII: KIDNAPPING COUNT VI: UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE COUNT VIII: TERRORISTIC THREATENING IN THE FIRST DEGREE COUNT IX: FELON IN POSSESSION COUNT XIII: CARRYING, USING OR THREATENING TO USE A FIREARM IN THE COMMISSION OF A SEPARATE FELONY
	HONORABLE WENDELL K. HUDDY JUDGE
	ORDER GRANTING MOTION FOR EXTENDED TERM OF IMPRISONMENT

ORDER GRANTING MOTION FOR EXTENDED TERM OF IMPRISONMENT

The State's Motion for Extended Term of Imprisonment was heard on February 1, 2000, before the Honorable Wendell K. Huddy. Deputy Public Defender Todd Eddins appeared on behalf of Defendant Wayman Kaua, and Prosecuting Attorney Peter Carlisle and Deputy

(CERTIFICATE OF SERVICE ATTACHED)

Prosecuting Attorney Jean Ireton appeared on behalf of the State of Hawaii.

The Court finds that Defendant is a multiple offender pursuant to HRS § 706-662(4)(a), based on his being sentenced for two or more felonies and being already under sentence of imprisonment for a felony, whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The Court makes the following findings:

1. On November 22, 1999, Defendant was convicted of the offenses of Attempted Assault in the First Degree, four counts of Reckless Endangering in the First Degree, Attempted Manslaughter, two counts of Kidnapping, Unlawful Imprisonment in the Second Degree, Terroristic Threatening in the First Degree, Ownership or Possession Prohibited of any Firearm of Ammunition by a Person Convicted of Certain Crimes, and Carrying, Using or Threatening to Use a Firearm in the Commission of a Separate Felony.

2. Defendant was on parole in Cr. No. 90-1996 when he committed the instant offenses.

3. Defendant has a long history of substance abuse.

4. Defendant has a history of assaultive and threatening behavior.

5. Shortly before the instant incident Defendant abused drugs.

6. Under extreme stress and impairment from drugs Defendant is unable to control his behavior.

7. Defendant's access to firearms is of great concern.

8. Defendant has positive factors in his history, including serving as a youth football coach and having the support from a loving family and church members.

THEREFORE, IT IS ORDERED that the State's Motion for Extended Term of Imprisonment is granted, and Defendant is sentenced to an extended term of imprisonment of life in Counts 4 and 13, twenty years in Counts 2 and 9, and ten years in Counts 3, 8, 10, 11, and 12.

DATED: Honolulu, Hawaii, 4/5/00.

THE HONORABLE WENDELL K. HUDDY
JUDGE OF THE ABOVE-ENTITLED COURT